

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII**

In the Matter of

PUBLIC UTILITIES COMMISSION

Instituting a Proceeding to Investigate the
Implementation of Feed-in Tariffs

Docket No. 2008-0273

PUBLIC UTILITIES
COMMISSION

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**RESPONSE OF SEMPRA GENERATION TO
THRESHOLD LEGAL QUESTIONS IN APPENDIX C OF THE
NATIONAL REGULATORY RESEARCH INSTITUTE SCOPING PAPER**

AND

CERTIFICATE OF SERVICE

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January 12, 2009

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**RESPONSE OF SEMPRA GENERATION TO
THRESHOLD LEGAL QUESTIONS IN APPENDIX C OF THE
NATIONAL REGULATORY RESEARCH INSTITUTE SCOPING PAPER**

In accordance with the Commission's letter dated December 11, 2008, Sempra Generation hereby responds to the Threshold Legal Questions presented in Appendix C to the Scoping Paper published by the National Regulatory Research Institute. Sempra Generation's responses are not offered as, nor to be construed as, legal opinions regarding Hawaii law. Rather, Sempra Generation offers its observations on the issues raised in order to assist the Commission and parties in the resolution of those issues.

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result. For example:
 - a) Is this result permissible under current Hawaii statutes?

RESPONSE:

HRS § 269-27.2(c) states, in relevant part, that

In the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the commission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather

than producing the electrical energy.

Because the proposed feed-in tariff to be considered by the Commission in this proceeding would be solely applicable to "nonfossil fuel generated electricity" supplied to the HECO Companies, HRS § 269-27.2(c) appears to prohibit the Commission from approving and adopting a feed-in tariff with pricing that exceeds the utility's avoided cost.

What is specifically meant by "avoided cost" becomes more clear in the context of HRS § 269-27.2, which directs the Commission, when setting the rate for renewable energy to "remove[] or significantly reduce[] any linkage between the price of fossil fuels and the rate for the nonfossil fuel generated electricity...." This indicates a legislative intent that, to the extent the utilities are subject to a 70% renewable energy obligation, "avoided cost," refers to the cost the utility otherwise would have incurred to produce renewable energy under these circumstances.

- b) Does HRS § 269-27.2 create a ceiling on the feed-in tariff price?

RESPONSE:

See the response to subpart a) above. HRS § 269-27.2 appears to create a price ceiling of "one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy."

- c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed-in tariff price does not violate the statute?

RESPONSE:

This question raises a number of issues of interpretation and implementation, some of which may have been answered by the Commission in other proceedings or decisions of which Semptra Generation is not aware.

The short answer is that the parties would need to demonstrate to the Commission that prices under the proposed feed-in tariffs do not exceed the utility's avoided cost.

HRS § 269-27.2 implies that "avoided cost" should be defined as the costs avoided by the utility when it procures *renewable energy pursuant to a 70% renewable energy goal* rather than producing the same *renewable energy* itself.

The Energy Agreement Among the State of Hawaii, Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs, and the Hawaiian Electric Companies (hereafter, "Energy Agreement") also states that the linkage between avoided costs and fossil fuel prices is "a vestige of the past" and pledges that all new renewable energy contracts will be delinked from fossil fuel oil costs. (Energy Agreement, Section 6). It would thus seem that the Commission will need to develop a calculation of avoided costs that explicitly incorporates Hawaii's 70% renewable energy policy.

2. As with any administrative agency decision, a Commission decision approving a feed-in tariff must be supported with substantial evidence.
 - a) Focusing on the price term, what evidence is legally necessary? Consider these options, among others:
 - i) evidence of actual costs to develop similar projects in Hawaii
 - ii) generic (i.e., non-Hawaii) evidence of costs associated with each particular technology
 - iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost

RESPONSE:

The Energy Agreement specifies that the pricing in the feed-in tariff "should be designed to recover *the renewable energy producer's costs of energy production plus some reasonable profit.*" (Energy Agreement, section 7, emphasis added). This language, together with the definitional interpretation of the term "avoided cost" described above, indicates that feed-in tariff pricing should be calculated on the basis of the costs of developing and operating similar projects in Hawaii under the market, environmental, and other circumstances that will exist under a 70% renewable energy objective. Thus, the Commission should focus on subpart i) and the costs of development in Hawaii rather than on generic costs.

The nature of any other evidence required to support the Commission's ultimate decision will be dictated by the terms of any feed-in tariff that is ultimately proposed. As suggested in the Scoping Paper, potential topics include evidence regarding locational and thermal constraints on

the transmission system, planned transmission system upgrades, loading on the distribution system, evidence concerning emissions and permitting requirements and timeframes and electricity demand forecasts. There should also be some evidence that the pricing and other terms of the feed-in tariff that is ultimately adopted promote the goals of the Energy Agreement and of Hawaii's renewable energy program.

The evidence should also demonstrate that the tariff pricing is not greater than 100% of the utility's avoided cost, as discussed elsewhere in these responses.

- b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it to the Commission, under the procedural schedule proposed by the signatories?

RESPONSE:

The schedule proposed in the Stipulation submitted by HECO and the Consumer Advocate on December 22, 2008 assumes that many issues will be determined by stipulation or consensus. If that assumption turns out to be misplaced, then the Commission may need to hold evidentiary hearings to develop a record on one or more issues. Unless any such hearings are narrow and focused, the schedule in the Stipulated Procedural Order may need to be modified to allow for full development of the evidentiary record.

- 3. Assume the Commission does create feed-in tariffs, which entitle the seller to sell to the utility at the tariff price.
 - a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?

RESPONSE:

It does not appear that there would be any violation of PURPA by adopting a feed-in tariff priced above the utility's avoided cost. The feed-in tariff and PURPA operate independent of one another. A seller relying on a state law right to sell renewable energy to the utility under a tariff approved by the state commission does not appear to implicate PURPA at all.

- b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new "avoided cost" equal

to cost it would have incurred under the state-mandated feed-in tariff?

RESPONSE:

If the feed-in tariff price exceeded the utility's avoided cost (as calculated prior to the existence of the tariff) *and* the requirement that the tariff price not exceed avoided costs remained in the law, there would be a conflict that the Commission would have to resolve. The seller's claim to tariff pricing as "avoided costs" may or may not be legitimate.

- c) If the price associated with a feed-in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?

RESPONSE:

Since the tariff price is supposed to reflect the developer's cost of production plus a reasonable profit (see response to item 2 a)), a tariff priced below avoided cost would presumably still encourage the development of renewable generation if it was priced at the cost of production plus a reasonable profit. Not all developers are going to be certifiable or certified as Qualifying Facilities under PURPA, and so it should not be assumed that facilities will automatically be eligible for avoided cost pricing. In addition, there may be other terms in the feed-in tariff that the developer views as commercially more attractive than a PURPA contract, notwithstanding the lower price.

- d) Please offer any other comments concerning the legal and practical relationship between the feed-in tariff and existing PURPA rights and obligations.

RESPONSE:

Sempra Generation does have any additional comments at this time.

Respectfully submitted,



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January 12, 2009

CERTIFICATE OF SERVICE

The foregoing **RESPONSE OF SEMPRA GENERATION TO THRESHOLD
LEGAL QUESTIONS IN APPENDIX C OF THE NATIONAL REGULATORY
RESEARCH INSTITUTE SCOPING PAPER AND CERTIFICATE OF SERVICE** was
served on the date of filing by electronic mail to those parties who provided e-mail addresses,
and by U.S. mail, postage prepaid, and properly addressed to the following parties:

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January 9, 2009

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PUBLIC UTILITIES
COMMISSION

**Re: RESPONSE OF SEMPRA GENERATION TO THRESHOLD LEGAL
QUESTIONS IN APPENDIX C OF THE NATIONAL REGULATORY
RESEARCH INSTITUTE SCOPING PAPER**

Dear Docket Office:

Enclosed please find an Original and nine (9) copies of RESPONSE OF SEMPRA GENERATION TO THRESHOLD LEGAL QUESTIONS IN APPENDIX C OF THE NATIONAL REGULATORY RESEARCH INSTITUTE SCOPING PAPER. This is being delivered via Federal Express priority overnight mail.

Please stamp one copy and return to us using the enclosed self-addressed, prepaid envelope. Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Theodore E. Roberts", written over a horizontal line.

Theodore E. Roberts
Attorney
Sempra Generation

Encl.